No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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S. 2062, 108th Cong. (2004) 21
S. Rep. No. 109-14 (2005) 20, 21
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Charles Alan Wright et al., *Federal Practice and Procedure* (4th ed.) 8

INTRODUCTION

Home Depot removed a class action within federal courts' original jurisdiction. Home Depot is the defendant in the class action, and Jackson is the plaintiff. Congress authorized a "defendant" to remove an action that contains a claim that could have been filed in federal court. A third-party counterclaim defendant is a defendant; it should therefore be entitled to remove when the other requirements for removal are satisfied. This Court carved out a narrow exception to the plain meaning of "defendant" in the general removal statute when it held in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that a counterclaim defendant that is *also* an original plaintiff does not qualify as a defendant for removal purposes. But none of the Court's reasons for making that exception—and no other reason—would support extending it to third-party counterclaim defendants. This Court should hold that a third-party counterclaim defendant is a defendant for removal purposes.[1]

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[1] Because of the phrasing of the Court's added question, "third-party counterclaim defendant" is used in this brief to refer to a party brought into a case as a new defendant to a claim asserted as or in conjunction with a counterclaim. As noted in the opening brief (at 16 n.*), however, that designation does not map onto the use of "third-party defendant" in Federal Rule of Civil Procedure 14. Moreover, the claims at issue in this case are not "counterclaims" because they are not asserted against the original (or any) plaintiff. JA36-JA40.

ARGUMENT

I. *Shamrock Oil* Should Not Be Extended To Third-Party Counterclaim Defendants.

Congress specified in the clearest possible terms that a "defendant" can remove when an action filed against it falls within federal courts' original jurisdiction. 28 U.S.C. § 1441(a).[2] The questions in this case boil down to whether a third-party counterclaim defendant is a defendant—and that question answers itself. A third-party counterclaim defendant is a defendant, not a plaintiff.

A. Nothing in *Shamrock Oil* Supports Extending Its Rule to Third-Party Counterclaim Defendants.

This case, like *Shamrock Oil*, presents a statutory-interpretation question. Both cases require this Court to interpret the same word (defendant) in nearly identical versions of the same statute (the general removal provision). In *Shamrock Oil*, the Court held that an original plaintiff is not a "defendant" under the general removal provision, even when defending a counterclaim. 313 U.S. at 104-109. The Court had no occasion to consider whether a counterclaim defendant that is *not* also a plaintiff can remove. But none of the reasoning in *Shamrock Oil*—and no other reason—supports extending *Shamrock Oil* to third-party counterclaim defendants.

1. In statutory interpretation, analysis should begin (and end, if possible) with the statute's text.

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[2] For ease of reference, relevant provisions of Title 28 are reproduced in a statutory appendix to this brief.

Section 1441(a) authorizes removal by "the defendant or the defendants." A third-party counterclaim defendant *is* a defendant. A third-party counterclaim defendant is not a plaintiff; it is only a defendant to the new claim filed against it. When a counterclaim is a claim that could have been filed in federal court based on diversity jurisdiction, an original defendant to *that* claim can remove under Section 1441(a).

Because nothing in Section 1441(a) purports to define "defendant," that term should be given its ordinary meaning. A defendant is "[a] person sued in a civil proceeding." *Black's Law Dictionary* 508 (10th ed. 2014). A third-party counterclaim defendant is a person sued in a civil proceeding—and is therefore a defendant. Jackson's argument depends on his assertion (at, *e.g.*, i) that "plaintiff" is limited to the party that initiates a lawsuit and "defendant" is limited to the party "against whom the plaintiff has brought claims." It is true that a plaintiff "brings a civil suit in a court of law." *Black's*, *supra*, at 1336. But nothing in that definition or in its ordinary use throughout the U.S. Code suggests that each civil case can have only one plaintiff or only one *type* of plaintiff. The terms "plaintiff" and "defendant" are umbrella terms, encompassing various sub-categories. *See id.* at 508, 1336 (listing several types of plaintiff and defendant in definitions). Jackson contends (at 18) that "defendants" encompasses only "parties sued by plaintiffs." But that is precisely what a third-party counterclaim defendant is—a party sued by a counterclaim plaintiff. Nothing in Section 1441(a) suggests that "defendant" does not include third-party counterclaim defendants. From

Home Depot's perspective, it is a defendant and only a defendant.[3]

2. In *Shamrock Oil*, this Court created an exception to the ordinary meaning of "defendant" in Section 1441(a)'s predecessor. The Court held—based on the history and purposes of the general removal provision—that a counterclaim defendant that is *also* an original plaintiff cannot remove. But none of the reasons that supported that carve-out support its extension to third-party counterclaim defendants.

First, in *Shamrock Oil*, the Court relied on the evolution of the statutory text, explaining that, since Congress first authorized removal in the Judiciary Act of 1789, ch. 20, 1 Stat. 73, Congress generally limited removal authority to defendants. *Shamrock Oil*, 313 U.S. at 104-107. The Court noted only two exceptions to that practice: the 1875 act, which authorized removal by "either one or more of the plaintiffs or defendants," Removal of Causes Act, ch. 137, § 2, 18 Stat. 470, 471 (1875), and the 1867 act, which authorized removal by "plaintiff or defendant" upon a showing of local prejudice, Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 559. When Congress again restricted removal authority to "the defendant or defendants" in 1887, the Court explained, it intended to withdraw *from plaintiffs* the authority to remove. 313 U.S. at 107-108.

The evolution of the statutory text that is now Section 1441(a) *supports*, rather than condemns, the conclusion that a third-party counterclaim defendant can

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[3] In this case, Home Depot was not able to remove the class action pursuant to Section 1441(a) because, *inter alia*, Home Depot's co-defendant Carolina Water Systems is a North Carolina citizen. *See* 28 U.S.C. § 1441(b)(2).

remove a qualifying case. Throughout the history of removal provisions, Congress conceived of parties in binary categories: plaintiffs and defendants. In most removal provisions, Congress specified that defendants alone can remove. When Congress expanded removal authority, it specified that "either party," "plaintiffs or defendants," may remove. § 2, 18 Stat. at 471; *see* 14 Stat. 558. That drafting history strongly suggests that Congress viewed *all* parties as plaintiffs or defendants, not that Congress intended "plaintiff" and "defendant" to describe only the original parties to the case. Jackson does not contest that any counterclaim defendant could have removed under the 1875 removal provision, which authorized removal by "plaintiffs or defendants"—and *Shamrock Oil* seemed to accept that as a given. *See* 313 U.S. at 106-107. But that correct premise requires accepting that a third-party counterclaim defendant is either a plaintiff or a defendant. It is not a plaintiff, so it must be a defendant—and nothing in the post-1875 removal provisions suggests that Congress intended to narrow the definition of "defendant" when it withdrew from plaintiffs the power of removal.

Second, *Shamrock Oil* is premised on the counterclaim defendant's status as a *plaintiff* in that case, not its status as a counterclaim defendant. Although in the removal context, Congress conceives of litigants as plaintiffs or defendants, some litigants are both. The question before the Court in *Shamrock Oil* was whether to treat an original plaintiff that was also a counterclaim defendant as a plaintiff or as a defendant for removal purposes. Notably, the Court nowhere suggested that the original plaintiff could not remove because its status as counterclaim defendant meant

that it was not a real defendant. Instead, the Court explained that the counterclaim defendant could not remove because it was also the *plaintiff*, and nothing in the drafting history or in the statute itself suggested that Congress intended to "sav[e] the right of a plaintiff, in any case or to any extent, to remove the cause upon the filing of a counterclaim." 313 U.S. at 107. Holding otherwise, the Court explained, would have required "sav[ing] a right of removal to some plaintiffs and not to others," and the Court could find "no basis" for doing so. *Id.* at 108.

None of those concerns applies with respect to a third-party counterclaim defendant. Such a defendant is not a plaintiff; it is only a defendant. Allowing a third-party counterclaim defendant to remove by giving "defendants" its ordinary meaning does not contravene Congress's intent to withdraw from plaintiffs the right to remove or require distinctions among plaintiffs.

Finally, *Shamrock Oil* explained that a plaintiff invoking state-court jurisdiction should not be permitted to remove when it becomes a defendant to a counterclaim because Congress had expressed its view that it is "just and proper to require the plaintiff to abide his selection of a forum." 313 U.S. at 106 n.2 (quoting H.R. Rep. No. 49-1078, at 1 (1886)). That concern reflected in part a desire to give "[d]ue regard for the rightful independence of state governments." *Id.* at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). The Court also relied on its earlier holding in *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1868), which interpreted the materially identical removal provision in the Judiciary Act of 1789 to exclude removal by a plaintiff subject to a counterclaim. The Court explain-

ed that *West* held that "the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *Shamrock Oil*, 313 U.S. at 106.

That concern also does not support extending the exception to third-party counterclaim defendants. A third-party counterclaim defendant does not voluntarily invoke state-court jurisdiction; he is "a defendant who has not submitted himself to th[at] jurisdiction." *Shamrock Oil*, 313 U.S. at 106. As explained in the opening brief (at 24-32), the history of diversity jurisdiction and removal authority illustrate that both are designed to protect an out-of-state litigant's right to have a cause against him heard in federal court. Jackson simply ignores that history, falling back repeatedly on his flawed premise that "defendant" encompasses only a party sued by an original plaintiff—a phrase that appears nowhere in Section 1441(a).

B. Jackson Identifies No Valid Reason to Extend *Shamrock Oil* to Third-Party Counterclaim Defendants.

Jackson offers a menu of reasons to extend *Shamrock Oil* to third-party counterclaim defendants. The Court should reject them all.

1. Jackson argues (at 24-31) that, if Congress intended to include third-party defendants when it authorized removal by "defendants," it would have said so specifically. But that is not how we interpret plain statutory text. This Court has explained that when Congress uses a broad phrase to describe the category of entities covered by a statute, there is no reason for it to specify each subcategory within the broader class.

Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 220 (2008). Here, Congress specified that "defendants" can remove a qualifying action. "We have no reason to demand that Congress write less economically and more repetitiously," *id.* at 221, by specifying every *type* of defendant that can remove when it already provides that they all can (at least when they are not also a plaintiff, per *Shamrock Oil*). It is well accepted, for example, that a defendant-intervenor can remove. 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3730 (4th ed.). Defendant-intervenors are usually denoted as such on dockets, pleadings, and orders. But that particular designation does not remove them from the umbrella term "defendants" in Section 1441(a).

Jackson points to one statutory provision and one rule that separately refer to "defendants" and "third-party defendants." Jackson notes that Federal Rule of Civil Procedure 30 limits the number of depositions that may be taken "by the plaintiffs, or by the defendants, or by the third-party defendants," Fed. R. Civ. P. 30(a)(2)(A)(i), and contends (at 26) that the separate designation of defendants and third-party defendants signals that "defendants" does not "automatically include[] third-party defendants." That is wrong. The Rules Committee referred separately to "defendants" and "third-party defendants" in Rule 30 because it wanted to treat them as separate entities for purposes of limiting depositions. Original defendants and third-party defendants are often not aligned, so it makes sense to give each type of defendants a separate allotment of depositions. Under Jackson's logic, if the Rules Committee had designated ten depositions for plaintiffs and ten for "defendants," third-party defen-

dants would be entitled to *none*. That cannot be right. The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011)—which authorizes the joinder of parties accused of patent infringement as "defendants or counterclaim defendants," 35 U.S.C. § 299 (cited at Resp. Br. 27)—also provides no help. Congress's choice to be more specific in unrelated statutes does not suggest that "defendants," standing alone, should not have its ordinary meaning in the context of removal where Congress treats parties as either plaintiffs or defendants.

More generally, there is no merit to Jackson's suggestion that, when Congress specifies special treatment for a subcategory of defendants in some provisions, it intends to *exclude* them from references to "defendants" in all other Code and rule provisions. Congress routinely provides for special treatment of a subclass within an umbrella term without restricting the meaning of the umbrella term in other provisions. The term "corporation," for example, designates a legal status that encompasses a number of different types of corporations. *See Black's*, *supra*, at 415-419. In some U.S. Code provisions, Congress refers to specific types of corporations—for example, when establishing special taxation rules applicable to S-corporations. 26 U.S.C. §§ 1361-1379. But by singling out S-corporations for special tax treatment in those provisions, Congress did not thereby *exclude* S-corporations from the general declaration in 26 U.S.C. § 11 that "[a] tax is hereby imposed for each taxable year on the taxable income of every corporation." An S-corporation is a type of corporation, just like a third-party counterclaim defendant is a type of defendant. Congress afforded special treatment to S-corporations in limited

circumstances—but when Congress elsewhere imposes rules on "corporations," those rules apply to S-corporations. The same is true here: very occasionally, counterclaim or third-party defendants receive special treatment. But that does not suggest that counterclaim or third-party defendants are not included when Congress uses the umbrella term "defendant."

Jackson also asserts that accepting Home Depot's view would "have troubling consequences" and "lead to absurd results." Resp. Br. 34 (capitalization altered). Jackson notes that "defendant" appears in at least 490 federal statutes (civil and criminal) and suggests that chaos will reign if "defendant" is understood to include many defendant types, including third-party counterclaim defendants. Curiously, Jackson fails to identify *even one* of those 490 provisions that would be rendered senseless or be expanded beyond what Congress intended if the Court were to adopt Home Depot's view. And, under Jackson's view, third-party defendants would have no responsive pleading obligation under Federal Rule of Civil Procedure 12(a)(1), which refers to "defendant[s]," but does not mention third-party defendants. The Court should reject Jackson's hyperbole.

2. Jackson's other textual arguments are equally flawed.

Determining whether a particular claim can form the basis of removal and who has the right to remove it should be made from the perspective of the claim. Jackson attempts to refute that commonsense proposition by noting (at 28) that Section 1441(a) authorizes removal of a "civil action," not of particular claims. That is true as far as it goes—but it does not go far.

When a claim within a civil action could have been filed in a federal court, the entire "civil action" is removable, including most claims that fall within federal courts' supplemental jurisdiction. *See* 28 U.S.C. § 1441(c). But it is plain on the face of Section 1441 that whether a civil action is removable can be determined only by examining whether the underlying *claims* are within federal courts' original jurisdiction. When a claim is removable, only the defendant *to that claim* can remove. This Court has already explained that whether a "civil action" is removable based on diversity jurisdiction must be determined by examining whether one or more claims in the action satisfies the requirements of 28 U.S.C. § 1332. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562-564 (2005); *see City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 166 (1997) (holding same in federal-question context).

This Court has held that when a defendant brings a counterclaim, he "institute[s] a cause of action" and "invoke[s] the jurisdiction" of the court in which it was filed. *Tex. & Pac. Ry. Co. v. Eastin*, 214 U.S. 153, 159 (1909); *see Freeman v. Bee Mach. Co.*, 319 U.S. 448, 453 (1943). And when that happens, "the defendant bec[o]me[s] a plaintiff." *Merch. Heat & Light Co. v. J.B. Clow & Sons*, 204 U.S. 286, 289 (1907). When an original defendant asserts a counterclaim against a third party, the original defendant therefore initiates an action in which it is the plaintiff and the third-party is the defendant.

3. Jackson also misunderstands Section 1441(a)'s requirement that a removable civil action must be within federal courts' "original jurisdiction." Jackson insists (at 22) that a civil action satisfies that require-

ment "only where *the plaintiff's complaint* could have been filed in federal court." That view has no basis in Section 1441(a)'s text. *See Carl Heck Eng'rs, Inc. v. Lafourche Par. Police Jury*, 622 F.2d 133, 136 (5th Cir. 1980) ("[T]he language of [then-operative Section 1441(c)] does not require only those causes of action joined by the original plaintiff to form the basis of removal."). "[O]riginal jurisdiction" in this context is not limited to state-court cases that could have been filed in federal court *as originally filed* in state court. If, for example, a state-court plaintiff amends her complaint by dismissing claims against a non-essential in-state defendant, thereby creating complete diversity where none existed before, the action would become one within federal courts' original jurisdiction and subject to removal—even though it was not removable as originally filed. That is apparent from Section 1446, which provides that when a case that is "not removable" based on "the initial pleading" later "become[s] removable," it can be removed. 28 U.S.C. § 1446(b)(3); *see* 28 U.S.C. § 1332(d)(7). In this case, the action "bec[a]me removable" (under 28 U.S.C. § 1453(b)) when Jackson filed his counterclaim and class-action complaint, which asserts claims within federal courts' original jurisdiction.

Jackson's assertion (at 34) that Home Depot's view "would allow a huge number of individual[] state-law cases into federal court" is mystifying. The only cases that would be allowed into federal courts are the cases that include claims that could have been filed in federal court. Home Depot's view would not expand federal courts' jurisdiction beyond that already established by Congress.

Jackson further errs in relying (at 22-23) on rules that govern the removability of cases within federal-question jurisdiction under 28 U.S.C. § 1331. This Court has held that whether an action falls within federal-question jurisdiction depends only on the plaintiff's well-pleaded complaint, without reference to the defendants' defenses. *See, e.g.*, *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-11 (1983). That rule does not apply where removability depends on district courts' diversity jurisdiction under 28 U.S.C. § 1332, which assumes that the relevant claims *do not* arise under federal law. Jackson errs in relying on two decisions stating that a counterclaim cannot form the basis of removal under federal-question jurisdiction. Resp. Br. 23 (citing *Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009); *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830-831 & n.2 (2002)). Neither decision involved removal and neither involved a new claim asserted against a new defendant. In each case, this Court in effect applied *Shamrock Oil*'s rule to hold that "arising under" jurisdiction could not be premised on a counterclaim asserted against the original plaintiff. *Vaden*, 556 U.S. at 54-55, 61-62; *Holmes Grp.*, 535 U.S. at 828, 832. But in each case, the Court was careful to note that the holdings were limited to federal-question jurisdiction—which was not at issue in *Shamrock Oil* and is not at issue here.

The purpose of the well-pleaded-complaint rule and related rules governing federal-question jurisdiction does not support adopting Jackson's view. The well-pleaded-complaint rule protects a plaintiff's right "to have the cause [of action] heard in state court" "by eschewing claims based on federal law." *Holmes Grp.*,

535 U.S. at 831 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987)). The opposite is true of diversity jurisdiction—diversity jurisdiction is intended to protect an out-of-state *defendant's* right to choose a federal forum when sued in state court. Allowing diversity-based removal when an original defendant asserts a qualifying claim against a new defendant respects the intent of the Framers and early Congresses. Pet. Br. 24-32.

4. Jackson also relies on what Congress has *not* done, arguing (at 32-33) that Congress's failure to amend Section 1441(a) in the face of a "consensus" among lower courts that "defendant" does not include third-party counterclaim defendants should be viewed as congressional ratification of that position. Jackson is mistaken in both his premise and his proposed conclusion.

Lower courts have *not* uniformly held that a third-party counterclaim defendant is not a "defendant" under Section 1441. Although most courts have (mis)interpreted *Shamrock Oil*'s original-plaintiff rule as an original-defendant rule, some have permitted removal by third-party counterclaim defendants. The Fifth Circuit held that, under an earlier version of Section 1441(c), a third-party counterclaim defendant could remove a counterclaim that was sufficiently distinct from the original plaintiff's claims. *Texas ex rel. Bd. of Regents v. Walker*, 142 F.3d 813, 816 (5th Cir. 1998); *Carl Heck Eng'rs*, 622 F.2d at 135. The Eleventh Circuit also permitted removal in such circumstances. *United Benefit Life Ins. Co. v. U.S. Life Ins. Co.*, 36 F.3d 1063, 1064 n.1 (11th Cir. 1994). Lower courts have noted that courts "are hopelessly divided on whether and under what circumstances a third party

defendant may remove." *Cent. of Ga. Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 937 (5th Cir. 1970); *Soper v. Kahn*, 568 F. Supp. 398, 400 (D. Md. 1983).

Even if lower courts had reached consensus, that would not support Jackson's reliance on congressional inaction. This Court has held that "'[c]ongressional inaction lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)) (brackets in original), specifically rejecting arguments that congressional inaction should be viewed as approval of an existing judicial gloss on statutory text. The Court has explained that "[t]he verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible," noting that "[t]his Court has many times reconsidered statutory constructions that have been passively abided by Congress." *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969). As Justice Thomas has explained, "it is inappropriate to give weight to 'Congress' unenacted opinion' when construing judge-made doctrines, because doing so allows the Court to create law and then 'effectively codif[y]' it 'based only on Congress' failure to address it.'" *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 299 (2014) (Thomas, J., concurring in the judgment) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 827 (2014) (Thomas, J., dissenting)) (brackets in original).

II. Home Depot Was Entitled To Remove This Action Under CAFA.

If the Court agrees that a third-party counterclaim defendant is a "defendant" under Section 1441(a), it follows *a fortiori* that a third-party counterclaim defendant can remove under the broader language in 28 U.S.C. § 1453(b). The posture of this case makes the point starkly. With the exception of Jackson (the representative party bringing the class action), *every* member of the purported class is a plaintiff and nothing else; Home Depot is a defendant and nothing else. Yet, Jackson's entire argument is premised on the notions that his co-class members are not plaintiffs and that Home Depot is not a defendant—premises that blink reality. Indeed, the class action is not a "counterclaim" as to Home Depot, which has never asserted claims against Jackson, the original defendant.

A. The Text, Structure, and Purpose of CAFA Confirm That a Third-Party Counterclaim Defendant Can Remove.

1. Section 1453(b), enacted as part of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, provides that "any defendant" may remove a qualifying "class action." Jackson asserted his class action by joining it with a counterclaim in state court[4]—but it is still a "class action" within the meaning of Section 1453(b). Jackson's complaint confirms

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[4] Although irrelevant to the outcome here, Home Depot's opening brief erroneously stated (at 8) that Citibank was also a defendant to the class action.

that he is asserting "a consumer class action," that he is the "Third-Party Plaintiff," and that Home Depot is a "Third-Party Defendant[]." JA22.[6] Because the plain meaning of "defendant" includes third-party counterclaim defendants, Home Depot was entitled to remove under Section 1453(b).

2. "Defendant" should have its ordinary broad meaning across removal statutes, encompassing all types of defendants (original defendants, defendant-intervenors, third-party counterclaim defendants, etc.), at least when they are not also plaintiffs. But if the Court instead holds that "the defendant or the defendants" has a specialized (atextual) meaning in Section 1441(a), it should still hold that "any defendant" in Section 1453(b) includes third-party counterclaim defendants.

a. In enacting CAFA, Congress significantly broadened removal for class actions. First, Congress expanded the types of class actions falling within federal courts' original diversity jurisdiction. 28 U.S.C. § 1332(d)(1)(B). Second, for those class actions, Congress removed the rule that an action must be removed within one year. 28 U.S.C. § 1453(b). Third, Congress eliminated the requirement (which was then a judicial

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[6] Although state-law designations do not control whether a party can remove, North Carolina law views Home Depot as a plain-vanilla defendant to Jackson's counterclaim. North Carolina Rule of Civil Procedure 13(h) provides that, "[w]hen the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or crossclaim, the court shall order them to be brought in *as defendants*[.]" N.C. Gen. Stat. § 1A-1, Rule 13(h) (emphasis added); *see also* Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment.

gloss, *see Chi., Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 247-248 (1900), and is now codified at 28 U.S.C. § 1446(b)(2)(A)) that a defendant may not remove an action without the consent of its co-defendants. 28 U.S.C. § 1453(b). Fourth, Congress removed the restriction that an in-state defendant may not remove. *Ibid.* Finally, Congress specified that "any defendant" can remove a qualifying class action.

This Court has explained that "any" "has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Because a third-party counterclaim defendant is a defendant of whatever kind, it qualifies as "any defendant" under Section 1453(b). Far from being a "mousehole[]," Resp. Br. 37 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)), "any" is a capacious word that encompasses elephant defendants and mouse defendants alike.

Jackson supports his atextual reading by pointing to other instances in which Congress uses "any defendant," arguing (at 46-47) that nothing in those provisions indicates that "any defendant" includes third-party counterclaim defendants. But that is not how we do statutory interpretation—the question is whether anything in those statutes suggests that "any defendant" should *exclude* a type of defendant. And the answer is no. Jackson's reliance (at 31-32, 47) on statutes that authorize removal by "any party" is equally unavailing. There is no reason to think that, by using a different phrase in unrelated removal provisions, Congress intended "any defendant" in Section 1453(b) to have an atextual meaning. Moreover, both of the statutes Jackson relies on govern subject matter

areas (patent and bankruptcy law) over which federal courts have exclusive jurisdiction. Congress's use of an even more capacious term in that context does not counsel in favor of an artificially narrow reading of "any defendant" in CAFA.

b. Jackson also argues (at 44) that Congress's change from "the" to "any" did not expand the class of defendants entitled to remove because it instead eliminated the requirement that all defendants must agree to removal. That is wrong because Congress did that directly with the addition of "without the consent of all defendants." 28 U.S.C. § 1453(b). But even if the addition of "any" helped to effect that change, Jackson's contention that that is all it did is wrong. This Court interpreted "the defendant" in the predecessors to Section 1441(a) to mean *both* that a counterclaim defendant could not remove when also a plaintiff *and* that a defendant could not remove without the consent of co-defendants. *Shamrock Oil*, 313 U.S. at 104-109; *Chi., Rock Island & Pac. Ry. Co.*, 178 U.S. at 247-248. Jackson argues that by changing "the" to "any," Congress overturned the unanimity requirement (which at the time of CAFA's enactment had not yet been codified), but offers no reason to believe that it did not *also* overturn *Shamrock Oil*'s restrictive reading of who may remove. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 339-340 (4th Cir. 2008) (Niemeyer, J., dissenting).

c. Jackson also argues (at 50-53) that a plain-text reading of Section 1453(b) "would authorize removal of literally any class action." He contends that Section 1453(b) cannot be viewed as providing a basis for removal that is independent from Section 1441(a) because "[b]y its terms, § 1453(b) applies to *all* class

actions." Resp. Br. 51. That argument is puzzling—because Section 1453 expressly *does not* apply to all class actions. Section 1453(a) provides that "[i]n this section, the term[] 'class action' . . . shall have the meaning[] given . . . under section 1332(d)(1)." 28 U.S.C. § 1453(a). Section 1332(d) defines "class action" and provides that "[t]he district courts shall have original jurisdiction" over any "class action," so defined, that satisfies the amount-in-controversy requirement. 28 U.S.C. § 1332(d)(1)(B), (2). Construing CAFA to authorize removal by a third-party counterclaim defendant would have no effect on the original jurisdiction of federal courts because that jurisdiction is established by Section 1332. Jackson does not dispute that he could have filed his class action in federal court—and that if he had filed it as a stand-alone action in state court, Home Depot could have removed it.

d. Jackson also errs in arguing (at 39-45) that his view better reflects the purpose of CAFA. Congress enacted CAFA to permit large interstate (*i.e.*, diverse) class actions to be heard in federal court when the plaintiffs or a defendant so desire. Congress sought to eliminate the "parade of abuses" observed in state-court class actions by curtailing the ability of "plaintiffs' lawyers who prefer to litigate in state court to easily 'game the system' and avoid removal of large interstate class actions." S. Rep. No. 109-14, at 6, 10 (2005) (Senate Report).

Jackson agrees (at 39) that CAFA expands federal jurisdiction over certain class actions and is designed to prevent plaintiffs' lawyers from gaming the system to defeat federal jurisdiction. But Jackson errs in arguing (at 40-41) that Congress was content to allow the type of gamesmanship at issue here—*viz.*,

preventing removal by filing a removable class action as a counterclaim—because CAFA was the result of congressional compromise. The legislators who enacted CAFA compromised on its scope and substantive requirements. The Senate Report describes the bills that eventually evolved into CAFA as "compromise" versions of the bill originally introduced in 1999. Senate Report 2. Unlike the original bill, the compromise versions (and CAFA itself) apply to a smaller set of class actions and impose fewer obligations on class plaintiffs. *Compare* S. 353, 106th Cong. (1999), *with* S. 1751, 108th Cong. (2003), S. 2062, 108th Cong. (2004), *and* CAFA.

Jackson suggests (at 40) that because CAFA was a compromise, Congress was content to leave in place some (but not all) forms of gamesmanship that would override the requirements in CAFA. That is wrong. The compromises in CAFA related to *which* class actions are subject to its requirements and *what* those requirements are. But having settled those questions, it is absurd to believe that Congress further "compromised" by choosing to allow its determinations to be evaded.

More generally, this Court has held that CAFA must be interpreted *without* a presumption against removal because CAFA was "enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). Jackson ignores that holding. The Court's admonition that "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in federal court if properly removed by any defendant,'" *ibid.* (quoting Senate Report 43), combined with the plain text of

CAFA, requires a holding that Section 1453(b) authorizes removal by third-party counterclaim defendants.

B. Jackson's Alternative Arguments Provide No Basis for Affirming.

Jackson also urges (at 57-59) the Court to affirm on three alternative grounds. The Court should reject those arguments. It is worth noting that Jackson's alternative arguments ask the Court to accept that Home Depot is a "defendant" to the class action—which is exactly right.

First, Jackson argues (at 59) for affirmance because CAFA requires that any appeal of a remand order be decided within 60 days, 28 U.S.C. § 1453(c)(2), and this one was not. Because Jackson did not raise that objection in his brief in opposition, it should "be deemed waived." Sup. Ct. R. 15.2. Even if not waived, it is meritless. Jackson does not suggest—and nothing in the statute would indicate—that the 60-day rule is jurisdictional. The rule merely requires that an appeal be "denied" after 60 days (unless that period is extended "for any period of time"). 28 U.S.C. § 1453(c)(3), (4). That the appeal was instead denied (through affirmance of the remand order) after 60 days does not affect the scope of the issues properly before this Court. *See Dart Cherokee*, 135 S. Ct. at 552-553 (exercising jurisdiction where court of appeals denied request to appeal).

Second, Jackson argues (at 57-58) that the case falls within CAFA's "local controversy" exception to removability. That exception has four components, each of which must be satisfied—but Jackson cannot satisfy at least two. The local-controversy exception is inapplicable when, "during the 3-year period preceding the

filing of th[e] class action," another "class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." 28 U.S.C. § 1332(d)(4)(A)(ii). Materially identical claims, based on the same type of water-treatment systems, were filed against Home Depot less than a year before Jackson's class action. *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017). The exception is independently inapplicable when an in-state "defendant" is not one from whom the putative class seeks "significant relief." 28 U.S.C. § 1332(d)(4)(A)(i)(II). There is no reason to believe that in-state defendant Carolina Water Systems can satisfy the large judgment Jackson seeks on behalf of the class.

Finally, Jackson questions (at 59) whether his class action satisfies CAFA's $5 million amount-in-controversy requirement. It does. According to his complaint, Jackson seeks to certify a class of "several hundred" plaintiffs. JA33. For each member of the class, he seeks damages amounting to the purchase price of the systems (approximately $9,000) plus treble damages. JA34, JA39. Recovery by even 200 plaintiffs of $27,000 would result in a damages award above the $5 million threshold.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1332 provides:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal

jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

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[1] So in original. Probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441 provides:

§ 1441. Removal of civil actions

(a) GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) JOINDER OF FEDERAL LAW CLAIMS AND STATE LAW CLAIMS.—(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all

claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) ACTIONS AGAINST FOREIGN STATES.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) MULTIPARTY, MULTIFORUM JURISDICTION.—(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title,

except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j)[1] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

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[1] So in original. Section 1407 of this title does not contain a subsec. (j).

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) DERIVATIVE REMOVAL JURISDICTION.—The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1446 provides:

§ 1446. Procedure for removal of civil actions

(a) GENERALLY.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) REQUIREMENTS; GENERALLY.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant,

through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) REQUIREMENTS; REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the

plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) COUNTERCLAIM IN 337 PROCEEDING.—With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

(g)[1] Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

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[1] So in original. Section does not contain a subsec. (f).

28 U.S.C. § 1453 provides:

§ 1453. Removal of class actions

(a) DEFINITIONS.—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) REVIEW OF REMAND ORDERS.—

(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) EXTENSION OF TIME PERIOD.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

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[1] So in original. Probably should be "77p(f)(3)".